

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Commerce Committee

BILL: SB 872

INTRODUCER: Senator Smith

SUBJECT: Fictitious Names

DATE: March 31, 2009

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. O'Callaghan	Cooper	CM	Favorable
2. _____	_____	JU	_____
3. _____	_____	_____	_____
4. _____	_____	_____	_____
5. _____	_____	_____	_____
6. _____	_____	_____	_____

I. Summary:

This bill repeals s. 15.16, F.S., which provides a conditional waiver by the Department of State (department) of the requirement that an applicant, wanting to do business under a fictitious name, advertise the intention to register such fictitious name in a newspaper in the county in which the principal place of business will be located. Therefore, should this bill become law, businesses wanting to do business under a fictitious name will be required to publish its intent to use a fictitious name in a local newspaper and for a specific length of time.

This bill repeals s. 15.16 of the Florida Statutes.

II. Present Situation:

The Fictitious Name Act, under s. 865.09, F.S., provides the public notice of ownership of business entities that use a fictitious name.¹ Section 865.09(2)(a), F.S., defines a fictitious name as “any name under which a person transacts business in this state, other than the person’s legal name.” A “business” is defined as any “enterprise or venture in which a person sells, buys, exchanges, barter, deals, or represents the dealing in any thing or article of value, or renders services for compensation.”²

¹ Division of Corporations, *Fictitious Names-Frequently Asked Questions*, available at <https://efile.sunbiz.org/ficfaq.html> (Website last visited on March 27, 2009).

² See s. 865.09(1)(b), F.S.

Currently, s. 865.09, F.S., requires anyone engaging in business under a fictitious name to first register with the Department of State, Division of Corporations by filing a sworn statement listing:

- The name to be registered;
- The mailing address of the business;
- The name and address of each owner and, if a corporation, its federal employer's identification number and Florida incorporation or registration number;
- Certification by the applicant that the intention to register such fictitious name has been **advertised at least once in a newspaper**, as defined in ch. 50, F.S., in the county where the principal place of business of the applicant will be located; and
- Any other information the division may deem necessary to adequately inform other governmental agencies and the public as to the persons so conducting business.

In 2001, the Legislature created s. 15.16(6), F.S., which authorizes the department to waive the advertising requirement if the department indexes the fictitious name registration in a central database available to the public on the Internet.³ This public record may be accessed at <http://sunbiz.org>, through the department's website, at <http://www.dos.state.fl.us/>, or through <http://myflorida.com>.

According to the department, fictitious names are not required to be registered under the following circumstances:⁴

- When the applicant is registered with the Department of Business and Professional Regulation and their licensing board has not imposed requirements for the registration as a fictitious name.
- When the applicant is a corporation, partnership, or other legal entity filed or registered and in good standing with the Division of Corporations and is not transacting business under any other name.
- When the applicant is a federally chartered corporation and is not transacting business under any other name.
- If the name(s) (first and last) of the owner(s) is/are included in the business name. Example: Susan Brown's Flower Shop is not required to register. Susan's Flower Shop must register. John Smith and Joe Brown Plumbing is not required to register. Smith and Brown Plumbing must register.

The division reported that in FY 2007-08, a total of 134,794 fictitious names filings were recorded, which include both new filings and renewals.⁵ A fictitious name registration is only valid for 5 years and must be renewed to prevent the expiration of a fictitious name registration.⁶

³ See s. 1, ch. 2007-200, L.O.F.

⁴ Division of Corporations, *Fictitious Names-Frequently Asked Questions*, available at <https://efile.sunbiz.org/ficfaq.html> (Website last visited on March 27, 2009).

⁵ See the Committee on Commerce Issue Brief 2009-308, pg. 7, *Agency Sunset Review of the Division of Corporations of the Department of State*, available at http://www.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-308cm.pdf (Website last visited on March 27, 2009).

⁶ See s. 865.09(5)-(6)(a), F.S.

If a business fails to comply with the fictitious name registration requirements under s. 865.09, F.S., the business, its members, and those interested in doing such business may not maintain any action, suit, or proceeding in any court of this state until those requirements are complied with.⁷ Additionally, an action, suit, or proceeding may not be maintained in any court in Florida by any successor or assignee of such business on any right, claim, or demand arising out of the transaction of business by such business in this state until the requirements in s. 865.09, F.S., have been complied with.⁸

The failure of a business to comply with s. 865.09, F.S., does not impair the validity of any contract, deed, mortgage, security interest, lien, or act of such business and does not prevent such business from defending any action, suit, or proceeding in any court of this state.⁹ However, a party aggrieved by a noncomplying business may be awarded reasonable attorney's fees and court costs necessitated by the noncomplying business.¹⁰ Furthermore, a person who fails to comply with s. 865.09, F.S., commits a second-degree misdemeanor.¹¹

III. Effect of Proposed Changes:

Section 1 repeals s. 15.16, F.S., which provides a conditional waiver by the Department of State of the requirement that an applicant, wanting to do business under a fictitious name, advertise the intention to register such fictitious name in a newspaper in the county in which the principal place of business will be located.

This section would require businesses wanting to use a fictitious name to publish its intention at least once in a newspaper as defined in ch. 50, F.S., and in a county of its principal place of business. Section 50.031, F.S., states that a legal notice is not considered "published," unless the legal notice has been published:

- For the statutory prescribed period of time;
- In a newspaper which at the time of such publication shall have been in existence for 1 year;
- In a newspaper that has been entered as periodicals matter at a post office in the county where published; and
- In a newspaper which is a direct successor of a newspaper which together have been so published.

However, the above-listed considerations are not applicable if no paper exists in the county where a business has its principal place of business.¹² Proof of such publication must be made by uniform affidavit.¹³

⁷ See s. 865.09(9), F.S.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Sections 775.082 and 775.083, F.S., provide that a second-degree misdemeanor carries a penalty of a jail sentence of not more than 60 days and a fine of not more than \$500.

¹² See s. 50.031, F.S.

¹³ *Id.*

The affidavits required under ch. 50, F.S., must be in a specific format.¹⁴ Additionally, all counties having a population in excess of 450,000 people, according to the latest official decennial census, may have a charge of up to \$2 for the preparation and execution of each proof of publication or publisher's affidavit.¹⁵

Section 2 provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Should the bill become law, businesses wanting to use a fictitious name will be required to publish legal notices in a local newspaper and therefore, will incur costs associated with publishing those notices. Below is an example of publishing prices and potential impacts.

If one-fifth of all businesses that have registered fictitious names with the department were to renew their registration, under the proposed law, the total average cost for those businesses to publish fictitious name legal notices would be at least \$218,250.¹⁶

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

¹⁴ See s. 50.041(2), F.S.

¹⁵ See s. 50.041(3), F.S.

¹⁶ Cost estimate based on staff research of three major Florida papers' legal notice pricing.

VII. Related Issues:

At one time, the newspaper notice requirement was the best option for disseminating information to the public, at large. However, “in today’s age of interstate commerce, it is commonplace that much of a company’s business is not conducted locally,” therefore, a local newspaper publication may not provide notice to the audience the bill is designed to protect.¹⁷

DOS maintains a database via the Internet that is a cost-free option to consumers and businesses, and the notice is available when the information is needed to both people located locally or otherwise.

To the extent that the public has access to the Internet, the DOS database is an efficient mechanism for providing notice.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

¹⁷ The Florida Bar, Business Law Section’s opinion on an unrelated matter, as it pertains to newspaper publications of legal notices. Document on file with the Commerce Committee.